Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

Case No.88-957
IN THE UNITED STATES SUPREME COURT
TERM: October, 1988

Vincent S. Toussaint, M.D.,
Petitioner -vs-
Laurens County Health Care System
Russell Emerson, Edward M. Corley,
Walter A. Sigman, W. Paul Culbertson,
L. W. McClain, Michael R. Meeks,
James L. Walker, Reese Young, James G.
Ferguson, W. M. Wiley, individually and
in their official capacity as members of
the Board of Directors of Bailey Memorial
Hospital, and Clem P. Ham, individually and
in his official capacity as Administrator
of Bailey Memorial Hospital, Akhtar
Hussain, M.D., individually and in his
official capacity as Chief of the Medical
Staff at Bailey Memorial Hospital and as
a member of the Executive Committee of
Bailey Memorial Hospital, Bruce Marshall,
M.D., individually and in his official
capacity as a member of the Executive
Committee of Bailey Memorial Hospital,
Stephen Ramsay, M.D., individually and in
his official capacity as a member of the
Executive Commitee of Bailey Memorial
Hospital and as Chief of Service for
Pediatrics,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAYNESWORTH,MARION,McKay & GUERARD
O. G. Calhoun and G.Dewey Oxner, Jr.
P. O. Box 2048
Greenville, South Carolina
Telephone: (803) 240-3400
CULBERTSON, WHITESIDES AND TURNER
P.O. Box 54
Laurens, South Carolina 29360
Telephone: (803) 984-6565

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STATEMENT OF THE CASE

The Laurens County Health Care System is a governmental entity and political subdivision of the State of South Carolina. The Health Care System is governed by a Board of Directors who are named as Defendants in the within action. The System was established in 1982 by the merger of the Clinton Hospital District where the Bailey Memorial Hospital is located and the Laurens Hospital District wherein the Laurens District Hospital is located. Dr. Vincent Toussaint has had staff privileges at Bailey Memorial Hospital since 1976. Dr. Toussaint practices general surgery and general practice in Clinton, South Carolina. His record portrays a disconcerting history of disruptive activity within the hospital, questionable patient care, findings of unjustified surgical procedures, violations of rules and regulations, deficient record

keeping and alteration of records.

This action was instituted by Dr. Toussaint in December, 1986 when his staff privileges at Bailey Memorial Hospital were suspended as a result of unjustified mastectomys on three adolescent males and due to his having discharged a patient who died several hours after discharge without Dr. Toussaint ever having seen or examined the patient prior to discharge. Dr. Toussaint's complaint alleged violation of 42 U.S.C. 1983, anti-trust violations and several pendant state claims. The Defendants in due time answered and later filed a Motion for Summary Judgment as to all causes of action for alleged anti-trust violations. The Motion for Summary Judgement was argued on October 6, 1987 and by Order filed October 21, 1987 the Court granted the Defendant's Motion for Summary Judgment as to all anti-trust claims. (R.72-89).

The case was tried before the Honorable G. Ross Anderson, Jr. in Anderson, South Carolina without a jury on October 21, 22, and 23, 1987. An Order was filed by Judge Anderson on November 24, 1987 granting judgment to the Defendants on all causes of action. (A.18).

Thereafter, Dr. Toussaint filed a Motion pursuant to Federal Rules of Civil Procedure 52(b) to delete, amend, clarify and/or correct certain specified findings of fact in the Court's Order of November 24, 1987. After oral arguments an Order was issued on March 31, 1988 amending one sentence of the Order and denying the further requested amendment. (R.154-155).

Thereafter, Dr. Toussaint appealed the District Court Decision to the United States Court of Appeals for the Fourth Circuit. By Decision dated September 7, 1988 the Court of Appeals for the Fourth Circuit affirmed the Decision of

the District Court.

ARGUMENT

I

THE FINDINGS OF FACT OF THE DISTRICT COURT ARE CLEARLY SUPPORTED BY THE RECORD

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari must be denied because there is no conflict among the Circuits concerning the scope of review under Rule 52(a). The law is clear from long established principles that the Findings of Fact of the Trial Judge can not be set aside unless clearly erroneous and the Court must give due regard to the opportunity the Trial Court had to judge the credibility of the witnesses.

ARGUMENT

In the United States v. United States Gypsum Company, 333 U.S. 364, 68

S.Ct. 525, 92 L.Ed. 746(1948), the Supreme Court set forth the scope of appellate review under Rule 52(a):

> "That rule prescribes that findings of fact in actions tried without a jury shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses. It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice in equity prior to the present rules of civil procedure was that the findings of the trial court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the Appellate Court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been made."

Furthermore, a reviewing court may not set aside a finding of fact merely

because it would have viewed the facts differently or given more weight to evidence than did the trial court. In the case of Inwood Laboratories v. Ives Laboratories (1982) 456 US 844, 102 S. Ct. 2182, 72 L.ed. 2d 606, the Supreme Court held that in a trademark violation action the Court of Appeals erred in rejecting findings of fact simply because it would have given more weight to evidence of mislabeling than did the trial court. Further in the case of United States v. National Association of Real Estate Boards (1950) 339 US 485, 70 S.Ct. 711, 94 L Ed. 1007, it was held that it was not enough that we might give the facts another construction, resolve the ambiguities differently and find a more sinister cast to actions which the District Court apparently deemed innocent. The court there stated that, "We are not given those choices because our mandate is not to set

aside finding of fact unless clearly erroneous."

In the case of Anderson v. City of Bessemer, N.C. (1985) 105 S.Ct. 1504, 84 L Ed. 2d 518, the Supreme Court held that under the deferential standard of review imposed by Rule 52, a fact finders choice between two reasonable interpretations of the evidence cannot be held clearly erroneous. Further, the Court held that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses and when oral testimony has been heard by the trial court, the reviewing court should be particularly reluctant to upset findings of fact.

In the case of United States v. Oregon State Medical Society (1952) 343 U.S. 326; 72 S.Ct. 690, 96 L. Ed. 2d 978, the court in regard to the scope of appellate review under Rule 52(A) stated that there are no cases more appropriate

for adherence to this rule than those in which the complaining party creates a vast record of cumulative evidence as to long past transactions, motives and purposes, the effect of which depends largely on credibility of witnesses.

Clearly a strong presumption exists in favor of the trial court's findings of fact and the burden of proof is on the party attacking their validity. See Gibbs v. Norfolk Southern Ry (CA 4th 1973) 474 F 2d 1341.

Under the above stated guidelines a thorough review of the record of these proceedings establishes without question that the findings of fact by the District Court cannot be held clearly erroneous. The credibility of the witnesses in this case was extremely important and due regard must be given to the opportunity the trial judge had to assess the credibility of the witnesses. This is particularly true in

light of this case where Dr. Toussaint admittedly altered medical records in an attempt to justify his actions (R 717-719) and where his credibility has been called into question by other agencies reviewing his records and testimony on other occasions (R 1142; 1407; 1415).

After the issuance of the order by the District Court, the Petitioner filed a motion pursuant to Rule 52 to amend the findings of fact on two issues. Pursuant to this motion the Court issued an Order on March 31, 1988 amending one sentence in Paragraph 14 of the Court's Order of November 24, 1987. The Petitioner never submitted further evidence in support of his position as requested by the Trial Judge pertaining to the finding that Toussaint admittedly altered the medical records and, therefore, no further amendment was granted. The findings of fact of the Trial Judge are clearly and

completely supported by the record.

There is no conflict whatsoever among the Circuits concerning the scope and application of Rule 52(a). Thus no occasion is given for this Court to review this Decision on the basis of a conflict among the Circuits concerning the scope and application of the Rule. Further, there is a critical credibility issue in this case due to the admitted alteration of records by Dr. Toussaint. Therefore, the ability of the Trial Court to Judge the credibility of the witnesses, especially the Petitioner, must be given great weight. There is clearly no evidence to persuade the Court that a mistake has been committed in the findings of fact which would entitle the Petitioner to a review by this Court.

II

THE TRIAL COURT CORRECTLY DECIDED THAT THE PLAINTIFF WAS AFFORDED DUE PROCESS AND FAILED TO SUSTAIN HIS CAUSE OF ACTION FOR

VIOLATION OF 42 U.S.C. 1983.

SUMMARY

The Petitioner's due process rights were faithfully observed even to the extent that he was allowed to handpick a special hearing committee to conduct his peer review. There is no basis for review in a case such as this where an incompetent physician has been properly disciplined and the Trial Court's Decision is in accordance with the rulings in other Federal Circuits. Further, the Court should not attempt to minutely codify the requirements and regulations of medical practice as the Plaintiff requests and substitute its evaluation of medical peer review for hospital boards who are charged with such responsibility.

ARGUMENT

This case affords no occasion for review by this Court on the basis of conflict among the Circuits. The Fifth

Circuit, Eighth Circuit and Fourth Circuit all are in accord that hospital staffs can not presribe the exact rules covering all phases of medical care with precision and exactness. The absurdity of the Petitioner's argument is readily apparent. Dr. Toussaint would ask this Court to minutely codify each requirement for a doctor to the extent that a doctor must see a patient before he can examine such patient or that you must not falsify or alter your medical records as did Dr. Toussaint and submit them to a peer review committee as the original records.

This point was concisely covered in the findings of the special ad hoc hearing committee handpicked by Dr. Toussaint when it issued its recommended decision. There the committee stated, "Much has been said about standards of practice. The committee accepts a definition of a standard of medical

practice as being that manner of care or degree of skill which would be rendered by a reasonable physician under the same or similar circumstances. To the members of this committee, Dr. Toussaint has been charged with violating two standards of practice that are so basic to the practice of medicine that it is unlikely anyone would bother to write them down, namely, Every surgical procedure will be justifiable and appropriate and no patient will be discharged without being seen and examined by the attending physician." (R.1751).

As has been stated in a number of cases, in the area of personal fitness for medical staff privileges, precise standards are difficult to articulate. The subjectives of selection simply can not be minutely codified. Also, detailed description of prohibited conduct is difficult in view of the rapidly shifting

standards of medical care and the fact that human lives may be involved in the ultimate decision of the Board. See Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173, 177 (Fifth Circuit 1971); Moore v. Board of Trustees, 88 Nev.207, 495 P. 2d 605, Cert. Denied, 409 U.S. 879, 93 S.Ct.85.

"After all, the law, as the District Judge held, does not require the hospital staff to prescribe exact rules covering all phases of medical care with precission and exactness. This was declared authoritatively in Sosa v. Board of Manager of Val Verde Memorial Hospital, supra:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at

> stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutcheon of Caduceus.

Sosa has been repeatedly cited as precedent on this point. See Klinge v. Lutheran Charities Ass'n., 523 F. 2d 56, 62 (8th Cir.1975); Battle v. Jefferson Davis Memorial Hospital, 451 F. Supp. 1015, 1025 (S.D. Miss. 1976), aff'd, 575 F.2d 298 (5th Cir. 1978), among others. The standards of evaluating the plaintiff's performance in this context were observed by the Committee herein. The plaintiff presented evidence both before the peer committee and before

this Court which was addressed directly to the factors stated by the peer committee as the standards of care applied by it in its decision herein. He is in no position to contend that he was in any way prejudiced in the slightest by a want of understanding of the standards of care which constituted the charges against him. Any claim of a denial of substantive due process herein is without merit.

As the district court has painstakingly outlined in its opinion, the plaintiff's procedural due process rights were faithfully observed." (J.A. 13-15).

Unfortunately, Dr. Toussaint is a physician who has been a constant source of difficulty throughout his medical career, not just with these defendants, but with almost everyone in the medical community with whom he has come in contact.(R.1144; 1407;1415;1421). The evidence submitted by Dr. Toussaint himself in the trial of this case

exemplifies his problems. Dr. Raymond Ramage, a Physician who taught the Plaintiff in his residency program, stated in an interview on November 30, 1978 as follows: "Dr. Ramage stated that Dr. Toussaint had been a constant source of trouble during the entire time that he was a resident at Greenville General Hospital.... He was disorganized and could not plan his work properly and frequently tied up the surgical facilities unnecessarily delaying other doctors with their surgery. Dr. Toussaint could not reach logical conclusions when presented with the medical facts and, therefore, it was questionable whether Dr. Toussaint should be certified even after he had finished his final year of residency.... Dr. Ramage further stated that he would not again turn out anyone like this." (R.1459).

Dr. Toussaint is simply not

entitled to the relief which he has requested and he has failed entirely to sustain his claim of violation of 42 U.S.C. 1983. In order for a governmental entity to be liable for its own violations, the Plaintiff in a Section 1983 action bears the burden of showing that the governmental entity maintained or practiced an unconstitutional or unlawful policy or custom and that the policy or custom caused or was the moving force behind the violation. Dominguez v. Beame, 603 F.2d 337(1979); Rizzo v. Goode, 423 U.S. 362, 370-71, 375, 377, 96 S.Ct.598, 46 L.Ed. 2d, 561 (1976).

A doctor has no constitutional right to practice medicine in a public hospital; however, the provisions of the Fourteenth Amentment must be met in granting or revoking a physician's staff membership. Christliff v. Annapolis Emergency Hospital Association, Inc., 496

F.2d. 174 (Fourth Circuit 1974). While a physician must be accorded reasonable notice of the charges against him and a fair opportunity to be heard with respect to those charges before a panel of fair minded doctors, the courts have held that a physician is not entitled to a full-blown judicial trial. Klinge v. Lutheran Charities Association of St. Louis, 523 F.2d. 56 (Eighth Circuit 1975).

Due process, furthermore, does not always require a hearing prior to the deprivation, for the exigencies of the situation and the fact that any due process concerns can be properly addressed by a post deprivation hearing may justify conducting a hearing after the deprivation. Matthews v. Eldridge, 424 U.S. 319 (1975); Kersey v. Shipley, 673 F.2d 730 (Fourth Circuit 1982). Because poor medical care and judgment pose such a great risk to the public, the suspension of a physician's

hospital privileges has been recognized as a situation where a post deprivation hearing is justified. Christliff v. Annapolis Emergency Hospital Association, Inc., supra.

The decision of the trial Court and the Fourth Circuit Court of Appeals that the Petitioner's due process rights were observed should be affirmed and the Petition for Writ denied. The Petitioner has been afforded more due process than the law requires and the requested relief of this action to minutely codify the exact requirements of all aspects of the medical profession is without merit.

CONCLUSION

The law is clear from long established principles that the findings of fact by the trial Judge can not be set aside unless 'clearly erroneous' and that the court must give due regard to the opportunity the Trial Court had to judge

the credibility of the witnesses. There is no conflict among the Circuits concerning the scope and application of Rule 52(a). Therefore, Petitioner has presented no valid reason for the granting of the Petition for Writ of Certiorari on this basis.

Further, the evidence clearly documents that the Petitioner's due process rights were faithfully observed and there was no violation of 42 U.S.C. 1983. The Petitioner's request that this Court minutely codify standards of practice for the medical profession and require hospital staffs to prescribe exact rules covering all phases of medical care with precision and exactness is clearly without merit and would be deleterious to the medical profession and our society.

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be denied.

Date: 12/26/88

Respectfully submitted,

HAYNESWORTH, MARION, McKAY AND
GUERARD
O. G. Calhoun
G. Dewey Oxner, Jr.
P. O. Box 2048
Greenville, S. C. 29602-2048
(803) 240-3400

CULBERTSON, WHITESIDES AND TURNER
J. Michael Turner
P. O. Box 54
Laurens, South Carolina 29360
(803) 984-6565

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Vincent S. Toussaint, M.D., Plaintiff, vs. Laurens County Health Care System, et al., Defendants.	)	ORDER 86-3165-3

This matter is before the court on motion of plaintiff pursuant to Fed. R. Civ. P. 52(b) to delete, amend, clarify and/or correct certain specified findings of fact in this court's order of November 24, 1987. After thoroughly reviewing the record, and briefs filed by both parties and after hearing oral arguments on this motion, the court hereby orders that sentence five (5) of paragraph fourteen (14) of this court's order of November 24, 19878 shall read as follows:

Evidence submitted by the plaintiff substantiated that in one proposed[1] audit conducted by the Upper Regional Savannah Audit Committee on a regionwide basis seventeen of twenty-five surgical procedures performed by Dr. Toussaint were found to be unjustified.

Footnote 1: Testimony of Dr. Baker indicated that the audit on splenectomies was ultimately rejected by both Bailey Memorial Hospital and the P.S.R.O. Certainly this action further evidences that there was no conspiracy against Dr. Toussaint with regard to the audit process.

The plaintiff also requests that paragraph twenty-eight (28) of this order be amended. At the hearing on this motion on February 24, 1988, the court informed the plaintiff's attorneys that it would consider any relevant portions of the record supporting the request for amendment of this paragraph which they wanted to submit subsequent to the hearing. No additional information has been submitted to this court. Therefore, after reviewing the trial notes, the memorandum submitted by both parties in response to this motion,

and the arguments proferred at the hearing, the court is of the opinion that paragraph twenty-four (24) is supported by sufficient evidence introduced at trial.

THEREFORE, IT IS HEREBY ORDERED that sentence five (5) of paragraph fourteen (14) of this court's order of November 24, 1987 shall be amended as stated in this order.

IT IS FURTHER ORDERED that paragraph twenty-eight (28) of the order of November 24, 1987 shall not be amended.

IT IS SO ORDERED.

/S/ G. Ross Anderson, Jr.
G. Ross Anderson, Jr.
United States District Judge

Anderson, South Carolina

March 31, 1988.